TOWN OF DANVERS AND LOCAL 2038, IAFF, MUP-2292, 2299 (4/6/77).

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DECISION

Statement of the Case

On July 9, 1975 and on July 15, 1975, Local 2038, International Association of Fire Fighters, AFL-CIO, CLC, (Union) filed with the Labor Relations Commission (Commission) two separate Complaints of Prohibited Practice each alleging that the Town of Danvers (Town) and the Town Manager of Danvers, Robert Curtis, had committed certain practices prohibited by §10(a)(1) and (5) of General Laws c. 150E (Law or c.150E).

After investigation, the Commission, on October 20, 1975 issued its own Complaint of Prohibited Practice consolidating the charges made in the two Complaints of the Union. The Commission's Complaint alleged that the Town had violated §10(a)(1) and (5) of the Law by refusing to bargain with the Union about certain conditions of employment, including duties to be required of new jobs and procedures for selecting incumbents for such jobs, minimum manpower on duty, work duties required of bargaining unit employees, and assignment of unit duties to non-unit personnel; and by instituting a unilateral change with regard to time sheets. The Town filed a timely Answer to the Complaint, denying that it committed the alleged prohibited practices. Thereafter, pursuant to Section 11 of the Law and Article III, Section 28 of the Rules and Regulations of the Commission, an Expedited Hearing was conducted before a duly designated Hearing Officer of the Commission. Hearings were held on several dates between February 6, 1976 and March 18, 1976, at which times the parties were afforded full opportunity to be heard, to cross-examine witnesses and to intro-uce evidence. Briefs were timely filed by the parties and have been considered. Sbusequently, the Commission, upon agreement of the parties, redesignated the hearings as formal hearings. Upon the record herein, we make the following findings of fact and render the following opinion.

Findings of Fact

1. The Town of Danvers is a municipal corporation situated in the County of Essex within the Commonwealth of Massachusetts and is a "Public Employer" within the meaning of Section 1 of the Law.

2. The Town Manager of the Town of Danvers is the Chief Executive Officer of the Public Employer within the meaning of Section 1 of the Law.

3. Local 2038, International Association of Fire Fighters, AFL-CIO, CLC is an "Employee Organization" within the meaning of Section 1 of the Law.

4. Local 2038, International Association of Fire Fighters, AFL-CIO, CLC is the exclusive representative for the purpose of collective bargaining for all uniformed firefighters employed by the Danvers Fire Department excluding the Chief and the Deputy Chief.

The Town maintains a permanent Fire Department. There are three fire stations in the Town: a central station; one on the grounds of the Danvers State Hospital; and one at the opposite end of Town from the hospital. The central station is equipped with one ladder truck, one engine, and one rescue vehicle. Each of the satellite stations contains a single engine. During any given tour a total of fourteen officers and firefighters are scheduled to be on duty. At the central station two firefighters are assigned to the ladder truck, one officer and four firefighters are assigned to the engine, and a single firefighter operates the desk and alarm system. At each of the sub-stations there is one officer and two firefighters. No specific personnel are assigned to the rescue vehicle. When an emergency arises officers and firefighters on duty are assigned to it.

On March 26, 1975, the Union and the Town began negotiations for a collective bargaining agreement to follow the collective bargaining agreement expiring on June 30, 1975. At this initial meeting the Union presented to the Town a numbered list of its proposals for changes from the then existing agreement between the parties. With respect to item number 16 relating to "coverage,"[1] items number 12[2] and 13 relating to "promotions," item number 17 regarding

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[1] 16. COVERAGE: An employee on duty complement of three (3) permanent or acting officers and eleven (11) firefighters will be maintained at all times. Such coverage will be provided by rank for rank overtime hiring; provided, however, that if, after giving all officers an opportunity to serve, a need continues for an officer fill-in, employees in the rank of firefighter shall be afforded the call-back opportunity.

Subsequent to the bargaining sessions, the parties participated in statutory impasse procedures (infra, p. 1563) including a presentation to a factfinder. Before the factfinder the Union modified its proposal as follows:

16. COVERAGE: The Union modifies its proposal as follows: An employee on duty complement of three (3) permanent or acting officers and eleven (11) firefighters will be maintained at all times. Such coverage will be provided by rank for rank overtime hiring provided, however, that, if after giving all captains an opportunity to serve, a need continues for a captain fill-in, employees in the rank of lieutenant shall be afforded the call-back opportunity and, that, if after giving all lieutenants an opportunity to serve, a need continues for a lieutenant fill-in, employees in the rank of firefighter shall be afforded the call-back opportunity.

[2] 12. ARTICLE XX: PROMOTIONS:
Provide a new Section as follows:
The establishment of a new position within the bargaining unit, the establishment of a pay rate for such position, the procedure for soliciting and selecting incumbents for such position, and the duties to be performed by such incumbents shall be the subjects of negotiations and accord between the Association and the Town prior to the establishment and manning of such position;

(cont'd.)

"duties,"[3] and item number 20 regarding "performance of work,"[4] inter alia,[5] the Town refused to bargain with the Union. Consequently, the Union filed the charges at issue herein. Since the time of the filing of said charges the dispute between the parties has been unsuccessfully mediated and the case proceeded to fact finding.

Opinion

In these consolidated cases, the Commission has re-examined its approach to questions concerning the scope of bargaining under the new Public Employee Bargaining Law, Chapter 1078 of the Acts of 1973.[6]

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2 (cont'd.)

13. ARTICLE XX: PROMOTIONS:

Upon ascertaining the Employer's position in terms of the Division of Civil Service's notice relative to "Ranking by Categories on Promotional Examinations", dated February 26, 1975, the Union intends to make a detailed proposal relative to such subject matter;

Before the factfinder the Union modified its proposals as follows:

12. ARTICLE XX: PROMOTIONS:

The Union modified its initial proposal by deleting the initial ten (10) words thereof, maintaining the rest of the proposal.

13. ARTICLE XX: PROMOTIONS:

The Union has clarified its proposal as follows: Permanent promotions shall be made pursuant to the following procedure: Employees falling within the first ranking, 100-90, shall be appointed by examination mark and, if two (2) or more receive the identical mark, seniority in grade shall govern, and, if employees have identical seniority in grade, then department seniority shall govern. If no or insufficient employees score within the first ranking, then promotions shall be made from the second ranking in accordance with the foregoing procedure. If no or insufficient employees score within the second ranking, then the third and, if necessary, fourth ranking shall be used, all in accordance with the foregoing procedures.

[3] 17. DUTIES:

The duties of line force employees shall consist of the prevention, control and extinguishing of fires, and duties related to the protection of and preservation of lives and property.

[4] 20. PERFORMANCE OF UNIT WORK:

The duties of employees shall not be assigned to non-unit personnel nor shall such personnel, with the exception of the Chief and Deputy Chief, be allowed to ride departmental apparatus or use departmental equipment.

[5] The Complaint of the Union, the Complaint of the Commission, the testimony at the hearings and the Briefs of the parties all focused on the four topics enumerated above. Accordingly, we rule only on these four topics.

[6] Chapter 1078 of the Acts of 1973, repealed prior municipal and state collective bargaining statutes (Section 1), enacted General Laws Chapter 150E (Section 2), and mandated last best offer procedures to resolve impasses between public employers and employee organizations representing police and firefighters (Section 4 - hereinafter referred to as "Outside Section 4) in order to distinguish it from Section 4 of c.150E).

In precedents developed under the National Labor Relations Act (NLRA),[7] scope of bargaining issues have been resolved by categorizing disputed subject matters as either mandatory subjects of bargaining, permissive subjects of bargaining, or illegal subjects of bargaining. If a particular subject is within the mandatory scope of bargaining, either party commits an unfair labor practice when it refuses a demand to negotiate. The parties may bargain on permissive subjects, but neither the employer nor the exclusive representative may insist to the point of impasse on negotiations over such topics. In the narrow area of illegal subjects of bargaining, negotitions are prohibited.

The Union argues that this mandatory/permissive scheme developed in the private sector under the NLRA is not applicable to public sector bargaining under G.L. c.150E. It suggests the substitution of a "conflicts" tests under which no subject would ever be excluded from the bargaining process and no contract provision sould be illegal unless it conflicted with a statute, regulation, or rule omitted from Section 7 of the Law. Thus, the Union argues that the Law requires bargaining on any subject either party may choose to raise and that bargaining could never be prevented. Only after a collective bargaining agreement is reached, the Union states, could a contractual provision be declared non-negotiable and then only if it were in conflict with a statute, rule, or regulation absent from Section 7. The Town takes the position that we have already adopted the mandatory/permissive scheme and that we should continue to apply it in this case and further argues that G.L. c.150E does not eliminate this dichotomy. In resolving this dispute the Commission will look to the statute, its legislative history, as well as Commission and judicial precedent. We will also be guided by decisions of the NLRB and the actions of other public employee relations commissions. Finally, we will consider public policy.

Historical Development of the Mandatory/Permissive Dichotomy

The concept of a mandatory/permissive standard for collective bargaining is not rooted in statute. It evolved in the private sector labor law through administrative interpretation of the NLRA by the National Labor Relations Board (NLRB or Board) and confirmation thereof by the United States Supreme Court. The National Labor Relations Act of 1935 established in general terms in Section 8(5) the employer's duty to bargain:

> It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of [section 9(a)].

Section 9(a) in relevant part states:

> Representatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment....

[7] 29 U.S.C. §151 et. seq.

Not until the Act was amended in 1947 did Congress impose a corresponding duty to bargain upon labor organizations.[8] Simultaneously, Congress in Section 8(d) defined collective bargaining as good faith negotiations over "wages, hours, and other terms and conditions of employment."[9] In 1955 the NLRB formally adopted the mandatory/permissive scheme in Wooster Div. of Borg-Warner Corp., 113 NLRB 1288, 36 LRRM 1439 (1955) in which it ruled that insistence to impasse by either party upon a non-mandatory subject of bargaining constitutes an unlawful refusal to bargain regardless of either party's good faith. The Supreme Court in NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1958) (hereinafter referred to as Borg-Warner) adopted the Board's reasoning, and reading sections 8(a)(5) and 8(d) together said:

> [T]hese provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to "wages, hours, and other terms and conditions of employment...". The duty is limited to those subjects, and within that area neither party is legally obligated to yield....As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree. 356 U.S. at 349.

Simply put, Borg-Warner requires a party to bargain only over wages, hours, and other terms and conditions of employment; a party may choose to bargain over other topics, but it is not compelled to do so.

The Board has applied the mandatory/permissive scheme in countless cases since its Borg-Warner decision. See for example, Capital Times Co., 223 NLRB No. 87, 91 LRRM 1481 (1976), Medicenter, 221 NLRB No. 105, 90 LRRM 1576 (1975), Covington Furniture Mfg. Corp., 212 NLRB 214, 87 LRRM 1505 (1974). During this period the mandatory/permissive scheme has been applied to public sector collective bargaining in many jurisdictions: West Irondequoit Board of Education, 4 PERB 3725, affirmed on rehearing 4 PERB 3753 (1971), affirmed 346 N.Y.S. 2d 418 (1973) (New York); West Hartford Education Association v. DeCourey, 295 A. 2d 526, 80 LRRM, 2422 (1972) (Connecticut); Clark County School District v. Board, 530 P.2d 114, 88 LRRM, 2774 (1974) (Nevada); NEA v. Shawnee Mission Board of Education, 512 P.2d 426, 84 LRRM 2223 (1973) (Kansas); Newark Firemen's Union of New Jersey, N.J. PERB, Docket No. SN-76-6 (1976) (New Jersey).

The Commission in Town of Natick, MUP-326, 351 (1973) enf. den. on other grounds, Town of Natick v. Labor Relations Commission, Mass. Adv. Sh. 31, (1976), 339 N.E. 2d 900 (1976), formally adopted the mandatory/permissive framework of analysis. See Appendix to Commission decision. In subsequent cases under G.L. c.149, §178G through N,[10] the Borg-Warner approach was applied consistently.

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[8] 29 U.S.C. 158(b)(3)

[9] 29 U.S.C. 158(d)

[10] G.L. c.149 §1781 provided that "For the purposes of collective bargaining, the representative of the municipal employer and the representative of the employees shall meet at reasonable times, including meetings appropriately related to the budget-making process, and shall confer in good faith with respect to wages, hours and other conditions of employment, or the negotiation of an agreement, or any question arising thereunder...."

Town of Marblehead, 1 MLC 1140 (1974); Town of North Andover, 1 MLC 1103 (1974); Groton School Committee, 1 MLC 1221 (1974); City of Salem, MUP-309 (1972). On November 26, 1973, the legislature enacted Chapter 1078 of the Acts of 1973. See footnote No. 6, p. 1562. The Commission finds no indication that the legislature intended to abandon the firmly established precedents under the NLRA and G.L. c.149 in determining the scope of bargaining under G.L. c.150E.

Statutory Interpretation

To determine the scope of bargaining under G.L. c.150E one must first examine Section 6:

> The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's budget-making process and shall negotiate in good faith with respect to wages, hours, standards of productivity and performance, and any other terms and conditions of employment, but such obligation shall not compel either party to agree to a proposal or make a concession. (emphasis added)

The Union argues that Section 6 calls for a "wide open if not unlimited"[1] scope of bargaining. We reject this argument. Clearly, the language of Section 6 parallels that of Section 9(a) of NLRA which Justice Steward in his concurring opinion in Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 57 LRRM 2609 (1964) characterized as words of limitation:

> The National Labor Relations Act does not say that the employer and employees are bound to confer upon any subject which interests either of them; the specification of wages, hours, and other terms and conditions of employment defines a limited category of issues subject to compulsory bargaining. 379 U.S. at 220.

The differences between Section 6 and Section 9(a) are the addition of the phrase "standards of productivity and performance" and the word "any" in front of the phrase "other terms and conditions of employment."

The Commission attaches little significance to the word "any" as a modifier of the phrase "other terms and conditions of employment" in Section 6. We do so because of the lack of consistency throughout the statute. In Section 2 of the Law the legislature failed to include the word "any" and consequently provided in that section that employees shall enjoy collective bargaining merely "on questions of wages, hours, and other terms and conditions of employment...." Furthermore, if the addition of the word "any" in Section 6 were interpreted to mandate a very broad, if not unlimited scope of bargaining, as the Union urges, then the words "standards of productivity and performance" as additional subjects within the scope of bargaining would be superfluous. These additional subjects would be subsumed within the unlimited scope of bargaining were the Union's interpretation of the phrase "any other terms and conditions of employment" to prevail. We conclude that the language of the statute neither mandates an unlimited scope of bargaining nor prohibits the application of the mandatory/permissive dichotomy.

[1] Union's Brief at p. 31.

Legislative History

The Union further argues that the absence of management rights language in Section 6 demonstrates that the legislature intended the scope of negotiations to cover traditional managerial prerogatives. We find unpersuasive the Union's use of legislative history to support that contention.

Forty-one petitions were filed with the legislature during the 1972 session seeking to amend the then-existing collective bargaining statutes for public employees contained in G.L. c.149. Some of these petitions proposed an expansion of bargaining rights for public employees (see, e.g., S946 and S1003), while others proposed statutory limitations on the scope of bargaining (see, e.g. H1980, H2961, H2963 and H3534). The most comprehensive amendments were contained in the text of H6194, Appendix B, the Fifth Interim Report of a special collective bargaining commission of the legislature, commonly referred to as the Mendonca Commission. H6194 proposed the following limitation on the scope of negotiations:

> Section 7:
> (b) The employer shall have the right to make appointments and determine standards therefore; direct employees; take disciplinary action for just cause; relieve employees from duty because of lack of work or for other legitimate reasons; maintain efficiency of governmental operations; set standards for quality of service; and take all necessary actions to carry out its mission in emergencies. These rights are not within the scope of collective bargaining except as they may be subject to whatever grievance procedures are appropriate under Section 9(a) of this chapter.

All of these petitions were referred to the Joint Legislative Committee on Public Service (Public Service Committee) and were the subject of lengthy public hearings during March of 1973.

In late May the Public Service Committee recommended a comprehensive revision of the public sector collective bargaining law (S1771). The proposed scope of negotiations contained no reference to the employer rights suggested by H6194 and did not specify the prerogatives of management in negotiations.

The Public Service Committee recommendation was immediately referred to the Senate Ways and Means Committee and appeared on the Senate calendar for debate in September.

On September 11, 1973 several dozen amendments to S1771 were prepared for consideration by the Senate. One amendment, filed by Senator Parker, contained the following language:

> Wages, hours and other items and conditions of employment shall not include matters of inherent managerial policy, such as:
> (a) to determine job qualifications, job content, and standards of work;
> (b) to hire, promote, transfer and assign employees;

(c) to determine what public services shall be provided and the level and extent of such services;
(d) to determine the methods, means and personnel by which the municipal employer's operations are to be conducted;
(e) to take action during emergencies.

Burdened by the weight of the proposed amendments, the Senate returned S1771 to the Senate Ways and Means Committee without taking action on any of the amendments, including the aforementioned amendment of Senator Parker.

During the following week the Senate Ways and Means Committee considered substantial revisions to S1771 and finally recommended a new draft - S1929 - to the Senate on Spetember 18, 1973; the new draft reiterated the scope of negotiation language which had previously appeared in S1771.

We do not consider the failure of the Senate Ways and Means Committee to recommend the proposed language of Senator Parker in S1929 to be a rejection by the Senate of managerial prerogatives. Whatever inferences might have been drawn from such failure were negated by the subsequent actions in the Senate. During the course of the Senate's consideration of S1929, the prospects for a comprehensive revision of the public sector collective bargaining law faded as critical amendments were attached to the draft. The Senate finally abandoned the proposal for a comprehensive law and in its place substituted minor revisions to the then-existing collective bargaining law in S1935.

Inasmuch as the version engrossed by the Senate contained scope of negotiation language identical to that in G.L. c. 149 (with the exception of equalizing the rights of state, county and municipal employees), we cannot ascribe to the Senate any conclusive intent to alter in any way the traditional management prerogataves which had evolved under G.L. c. 149.

Proponents of a comprehensive revision found a more favorable climate in the House of Representatives. The House Committee on Ways and Means, to which the Senate revision had been referred, recommended the changes which had been embodied in S1771 and which included in particular the following language:

Section 6. SCOPE OF NEGOTIATIONS
(a) The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's budget-making process and shall negotiate in good faith with respect to wages, hours, standards of productivity and performance, and any other terms and conditions of employment, but such obligation does not compel either party to agree to a proposal or make a concession.
(H7715)

During the course of the floor debates and redrafts in the House, no proposals relating to management rights in negotiations were introduced or debated.

The House engrossed a final version - H7751 - which contained the aforementioned scope of negotiation language. The Conference Committee, which had been estalbished to reconcile the radical differences between the House and

Senate versions, adopted the House approach of a comprehensive revision of the public sector bargaining law.

The few amendments which were suggested by the Conference Committee and which were adopted by the House and Senate did not affect the scope of negotiations. The final amended version was submitted to the Governor and signed on November 26, 1973.

From the absence of management rights language in the final draft, the Union infers a legislative intent to deny a limitation of management rights. We find other inferences to be more compelling.

Section 6 must be viewed in relation to its predecessors. As we noted above, the phrase "terms and conditions of employment" has a long history under the NLRA of not including management prerogatives, which were denoted permissive subjects of bargaining. G.L. c.149, §178 I was interpreted similarly by this Commission. The deletion from the proposed legislation of management rights language by the legislature does not appear significant when viewed together with the substantial adoption of the traditional language. We do not view the failure to adopt the management rights language in H6194 as the elimination of all historical managerial prerogatives.

The meaning of the management rights language in H6194 as proposed by the Mendonca Commission is unclear. One interpretation of that language is that it would have changed the status of bargaining on management rights from its traditional permissive status (bargainable at the will of the employer) to an illegal status (employers could not bargain over such subjects, despite a desire to do so). With this interpretation, the elimination of the management rights language merely insures that employers could continue to bargain over such subjects if they agreed to. A second interpretation is that since management rights were traditionally excluded from the scope of bargaining, the specific enumeration of those rights was merely redundant. Accordingly, the elimination of such language had no effect whatever. A third interpretation is that the management rights language of H6194 was language of limitation which narrowed the traditional area of managerial prerogatives. Thus, its elimination merely accorded public employers their traditional scope of managerial prerogatives.

The adoption in Section 6 of general language without specifically enumerated restrictions is similar to the adoption of §8(d) of the Taft-Hartley amendments to the NLRA. There, the House version, H.R. 3020, contained a detailed list of mandatory subjects of bargaining. The current language, "wages, hours, and other terms and conditions of employment," was substituted in the final version of the Act. Justice Stewart in Fibreboard, supra, interpreted the change as follows: "While the language thus incorporated in the 1947 legislation as enacted is not so stringent as that contained in the House bill, it nonetheless adopts the same basic approach in seeking to define a limited class of bargainable issues." 379 U.S. at 220-21. Similarly, the use of general language in Section 6 of G.L. c.150E defines a limited class of bargainable issues.

We conclude that the legislature, by borrowing the traditional language of the NLRA, intended to incorporate the mandatory/permissive dichotomy which in twenty-two years of practice had become virtually synonymous with the method of determining the scope of bargaining. Accordingly, in cases arising under G.L.

c.150E, we have continued to apply the mandatory/permissive distinction without serious challenge to its propriety. See Town of Marion, 2 MLC 1256 (1975); Medford School Committee, 1 MLC 1250 (1975); City of Worcester, 2 MLC 1238 (1975).

Judicial Interpretation

The courts of the Commonwealth have been presented with numerous opportunities to express their opinion on scope of bargaining issues, but have expressly declined to do so. Thus, in School Committee of Braintree v. Raymond, Mass. Adv. Sh. (1976) 399, 343 N.E. 2d 145, and School Committee of Hanover v. Curry, Mass. Adv. Sh. (1976) 396, 343 N.E. 2d 144, the Supreme Judicial Court reviewed decisions by arbitrators ordering reinstatement of supervisory employees of a school committee, and whose positions had been eliminated as a matter of educational policy. In each case, the Court concluded that the remedy ordered, re-establishment of the supervisory position, was beyond the authority of the arbitrator. The Court cautioned that its decisions were not be read as a comment on the negotiability of the provisions relied upon by the arbitrator. In Braintree, the Court acknowledged the traditional framework of scope of bargaining analysis by noting, "We do not decide any question with respect to the mandatory or permissive scope of collective bargaining." Town of Braintree, Mass. Adv. Sh. (1976) at 406, 343 N.E. 2d at 149.

In another 1976 decision, Boston Teachers Union, Local 66 v. School Committee of Boston, Mass. Adv. Sh. (1976) 1515, 350 N.E. 2d 707 (1976), the Court again indicated its reluctance to rule directly on negotiability issues. In that case an arbitrator had decided that the School Committee had violated the contract provision dealing with maximum class size. In deciding that the contract provision was enforceable, the Court concluded that the issue of class size was a "proper"[12] subject of bargaining.

Additionally, the Court stated:

> Obviously, the conditions of employment of school teachers and subjects within the prerogative of a school committee are not mutually exclusive. Mass. Adv. Sh. (1976) at 1523, 350 N.E. 2c at 713.

This dictum may be read as indicating that there is an area of managerial prerogatives over which a school committee need not bargain, but where agreements, if reached, are enforceable. This conclusion is strengthened by other language in the opinion:

> What we decide in this case should not be construed as a requirement that, in the course of collective bargaining, a school committee must reach agreement on class size, teaching load, or the use of substitute teachers. A school committee is entitled to maintain its own position on these

[12] The use of the term "proper" is suggestive of the mandatory/permissive approach. Under that analysis, if a contract provision covers a subject either mandatorily bargainable or permissibly bargainable (i.e., "proper"), the contract will be enforceable.

> subject as matters of fiscal management and educational policy. When, however, an agreement is made on these subjects consistent with the committee's view of fiscal management and educational policy, the terms of that agreement may be enforced where there has been no change in educational policy and funds are available to implement the terms of the agreement. Mass. Adv. Sh. (1976) at 1528, 350 N.E. 2d at 714.

This language supports the application of a mandatory/permissive distinction to determine the obligation to bargain in areas of fiscal management and educational policy. The suggestion that a school committee need not reach agreement on certain matters but that agreements incorporating such matters are enforceable indicates that the Supreme Judicial Court has recognized permissive subjects of bargaining.

In its most recent decisions interpreting G.L. c.150E the Supreme Judicial Court has continued its cautious approach to scope of bargaining considerations. Again deciding challenges to arbitration awards, the Court concluded that teacher evaluation procedures could be followed without such an evaluation impinging upon the non-delegable responsibilities of a school committee. See School Committee of Danvers v. Tynan, Mass. Adv. Sh. (1977) 415, ___N.E. 2d ___; Dennis-Yarmouth Regional Scool Committee v. Dennis Teachers Association, Mass. Adv. Sh. (1977) 428, ___N.E. 2d ___; School Committee of West Bridgewater v. West Bridgewater Teachers' Association, Mass. Adv. Sh. (1977) 434, ___N.E. 2d ___. Although an arbitrator could not award tenure to a teacher for a school committee's violation of the evaluation procedures, the Court concluded that other remedies, including reinstatement, were available in proper cases. Thus, the Court has defined narrowly the "illegal" area suggested by Hanover, supra, and Braintree, supra, in which contract provisions, even though agreed upon, may not be enforced.

Public Policy

If we were not persuaded by the historical development of the mandatory/permissive scheme and the legislative history of G.L. c.150E, our view of the public policy considerations compels us to apply the mandatory/permissive dichotomy.

The Union's position is that wide open, if not unlimited, bargaining is in the public interest - "that the parties engaged in bargaining should be free to determine for themselves in good faith, which aspects of the employment relationship require attention to the collective bargaining table."[13]

We believe that Justice Stewart's rationale for the mandatory/permissive dichotomy articulated in Fibreboard, supra, is perhaps more applicable in the public sector of our economy than in the private. He wrote:

> [T]he Court's opinion seems to imply that any issue which may reasonably divide an employer and his employees must be the

[13] Union's Brief at p. 23.

> subject of compulsory collective bargaining. Only a narrower concept of "conditions of employment" will serve the statutory purpose of delineating a limited category of issues which are subject to the duty to bargain collectively.... Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control.... If, as I think clear, the purpose of §8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or impinge only indirectly upon employment security should be excluded from that area. 379 U.S. at 221-23.

The public employer, like the private employer, must have the flexibility to manage its enterprise. Efficiency of governmental operations cannot be sacrificed by compelling the public employer to submit to the negotiating process those core governmental decisions which have only a marginal impact on employees' terms and conditions of employment.

The public employer has a greater responsibility to all citizens of the community than its counterpart in the private sector. The government, as employer, must be responsible not merely to narrow corporate interests but to the overall public interest.

> When management in the public sector gives up some if its "prerogatives,"...it foregoes the right to make decisions in the name of all the people. When management in the private sector loses its unilateral power to act, however, the public loses little or nothing because the decision-making process is merely transferred from one private group to another, rather than from public to private. The loss of the power to manage unilaterally in the public service is, therefore, more serious than the same phenomenon in the private sector. Kilberg, Appropriate Subjects for Bargaining in Local Government Labor Relations, 30 Md. L. Rev. 179, 193 (1970)

Therefore, those management decisions which do not have direct impact on terms and conditions of employment must not be compelled to be shared with the representatives of employees through the collective bargaining process. Those decisions must remain within the prerogative of the public employer. To compel the sharing of core governmental decisions grants to certain citizens (i.e. organized public employees) an unfair advantage in their attempt to influence public policy.

> In the public sector employees already have, as citizens, a voice in decision making through customary political channels. The purpose of collective bargaining is to give them, as employees, a larger voice than the ordinary citizen. Therefore, the duty to bargain should extend only to those decisions where the larger voice is appropriate. Summers, Public Employee Bargaining: A Political Perspective, 83 Yale L.J. 1156, 1193 (1970).

This special access to governmental decisions is appropriate only when those decisions directly affect terms and conditions of employment.

We concluded above that certain governmental decisions are not appropriately made via the collective bargaining process. The Union argues that this is insufficient justification for restricting the scope of bargaining because, they claim, merely to bargain does not presuppose agreement. We believe that this argument mistakes the nature of collective bargaining. The very act of collective bargaining contemplates and encourages agreement on all topics negotiated. Collective bargaining contemplates contractual provisions different from decisions which an employer would make absent the bargaining process.

The Union takes the position that the mandatory/permissive scheme is inapplicable in the public sector. It argues that the purpose of the dichotomy in the private sector is to limit the number of subjects over which a union could legitimately strike to force concessions from the employer. Consequently, in the public sector, the Union argues, where the strike or even the threat of strike is proscribed, there is no necessity to limit the number of negotiable subjects because an employer could never be forced by a union to make a concession or agree on any topic - including, of course, those topics which under the mandatory/permissive scheme are viewed as mandatory. This, however, underestimates the effectiveness of bargaining by public sector unions which, even without the strike weapon, have been successful in obtaining concessions from employers.

The Union's argument that the strike prohibition in the public sector provides a justification for wide-open bargaining is especially weak in the case of firefighter bargaining under G.L. c.150E. In collective bargaining between municipalities and their firefighters, the strike prohibition does not relegate the parties to potentially interminable bargaining sessions which may never culminate in a contract. Agreement is statutorily mandated by Outside Section 4 which provides for "last and best offer" arbitration. Under this procedure a panel of arbitrators must select the final offer of either the employer or the union. The selection of the panel is then incorporated into the agreement between the parties. Thus, with an unlimited scope of bargaining, agreement could be mandated on any subject raised by either party. The mandatory/permissive framework provides a mechanism to determine which subjects may be removed from the collective bargaining process prior to a forced agreement. A permissive subject, since it is voluntarily bargained, may be "weeded out" of the process before the parties make their final offers to the arbitration panel. See City of Worcester, 2 MLC 1238 (1975).

Similarly, the "conflicts" test propounded by the Union, by compelling unlimited collective bargaining, anticipates agreement on those decisions which we believe should remain as managerial prerogatives. The Commission rejects the "conflicts" test as a substitute for the mandatory/permissive dichotomy. We naturally accept the statutory commandment of Section 7 that a provision of a collective bargaining agreement will prevail over the enumerated statutes, rules, and regulations, but we see no reason why the Section 7 conflicts test cannot co-exist with the mandatory/permissive scheme. The question whether a subject is within the scope of bargaining pursuant to Section 6 is quite apart from the question whether a conflict exists between a contract provision and the enumeration in Section 7. Section 7 by its very language poses a dual test. First a matter must be determined to be within the scope of bargaining pursuant to Section 6. Second, it must be determined whether there is a conflict between that matter and the enumeration of Section 7.

A very broad scope of bargaining would be destructive of collective bargaining. Either party could indefinitely delay final agreement by demanding negotiations on issues far removed from terms or conditions of employment. For example, an employer could avoid a contract by forcing negotiations on internal union matters such as contract ratification procedures, the appropriateness of union fines, or the election of union officers.

We will now consider each of the alleged violations raised in Case No. MUP-2299[14] as well as the alleged unilateral change raised in Case No. MUP-2292.

Coverage (Minimum Manning)

The Union's proposal dealing with the manning issue is labeled "coverage." It would require that a minimum number of personnel be on duty at all times; and that personnel absent from a scheduled tour be replaced by people called back to work on overtime. This level of personnel services would be mandated regardless of the number of fire stations or the amount of firefighting equipment maintained by the Town. Thus, the flexibility of elected officials to determine the amount of fire services to be delivered within the Town would be severely curtailed. Agreement on minimum manning per shift in essence would lock the Town into a certain level of firefighting service for the duration of the collective bargaining agreement. Accordingly, it represents an intrusion into that type of governmental decision which should be reserved for the sole discretion of the elected representatives of all the citizens of the Town, rather than one which must be subjected to the bargaining process with the representatives of the employees hired to deliver the service. We find that such a decision regarding the overall number of employees to be hired by a municipality to deliver a given service falls squarely within the managerial control of the governmental enterprise, and should be negotiable only at the will of the public employer. Thus, we find it to be a permissive subject of bargaining.

The Commission notes decisions from other jurisdictions in which minimum manning per shift in a fire department is a permissive subject of bargaining. Matter of City of White Plains, Case No. U-0445, 5 PERB 3008 (New York); City of Newark, N.J. PERB No. 76-40 (1976) (New Jersey). These decisions further support our conclusions that within a mandatory/permissive scheme shift coverage in a fire department is a permissive subject of bargaining. Cases cited to us on the contrary proposition are not persuasive in that they turn on issues

[14]The Town has specified that as to each of these issues its position is that "[A]t all times during negotiations and up to the present, the Town has consistently maintained that these matters were non-mandatory subjects of bargaining and were in fact inherent management rights." Town's Brief p. 2. At no time did the Town make counterproposals or even point out to the Union any objections to specific language in its proposals. Thus, the Town simply refused to bargain about the generic subjects of the several proposals. Accordingly, this decision goes to the negotiability of these general topics, not to the legality of the contract language proposed by the Union.

of workload and safety.[15] There was evidence in this case that firefighters train as teams and that individual firefighters perform certain specified duties or evolutions in conjunction with other members of the team. We recognize that the workload and risk of injury of each firefighter increase as team complement at a fire is reduced or whenever substitution of a specific firefighter is made. Workload and safety, in turn, fall within the language of Section 6 of the Law: "wages, hours, standards of productivity and performance and any other terms and conditions of employment". However, we find that the number of firefighters on duty has no direct impact on workload and safety. We find that a decision regarding shift coverage in a fire department has far greater impact on the level of delivery of a public service than on workload and safety of firefighters. Thus, we find it to be a permissive subject of bargaining. Nothing in this opinion should prevent firefighters from bargaining with their employers regarding such subjects as safety or workload.

Promotions[16]

Procedures for promotion affect an employee's conditions of employment to a significant degree. We find that they are a mandatory subject of bargaining.

Our finding is in harmony with decisions under the NLRA and in the public sector. Old Line Life Ins. Co., 96 NLRB 499, 28 LRRM 1539 (1951); NLRB v. Proof Co., 242 F.2d 560 (7th Cir. 1957), cert. den. 355 U.S. 831 (1957); Police Officers Association v. Detroit Police Department, Mich. App. , 233 N.W. 2d 49, 90 LRRM 2912 (1975); City of Albany, Case No. U-1369, 7 PERB 3132 (1974). We agree that the possibilities of advancement in one's job and the manner in which

[15] Firefighters v. City of Vallejo, 12 Cal. 3d 608, 87 LRRM 2453 (1974), (Calif. Supreme Court) held that the city was required to enter into compulsory arbitration with a firefighter's union over the union's manning proposal. The original proposal related to the number of engine and truck companies and their component manpower requirements. It was later altered in compliance with a fact-finder's requirement to request a continuance of the manning schedule in effect. 87 LRRM 2453 at 2458. However, compulsory arbitration in that case was specifically limited to questions of workload and safety. The court noted that the maintenance of a particular standard of fire prevention within the community may well be a matter of management prerogative and outside the scope of the city charter arbitration provision. 87 LRRM at 2459. Similarly, City of Alpena v. Local 623, 50 Mich. App. 568, 224 N.W. 2d 672, 88 LRRM 3304 (1974) found that on the evidence presented there was a close relationship between the number of firemen on duty and the safety of the firemen. Thus, the order of an arbitration panel maintaining manpower status quo was affirmed.

[16] In its original proposed contract language under the general topic of "Promotions," the Union included "The establishment of a new position within the bargaining unit" (this was later deleted in the Union's fact-finding agenda), and "the establishment of a pay rate for such position." While we are limiting our decision to a determination of the general topics which the Town refused to bargain over, we would be doing a disservice to the parties to fail to point out that our decision in Northeast Metropolitan Regional Vocational School District, 1 MLC 1005 (1975), reaffirmed in Melrose School Committee, 3 MLC 1299 (1976), held that initial salary levels for newly created bargaining-unit positions are matters ofer which an employer and employee representative must bargain.

such advancement is obtained are inexorably intertwined with the nature of an employee's career. "The extent to which promotion is possible and the performance required to obtain promotion will in large part determine how the job is done...." Police Officers Association v. Detroit Police Department, supra, at 90 LRRM 2914.

This is not to say that all issues relating to promotions are necessarily mandatory subjects of bargaining. The NLRB makes a distinction between promotions within the bargaining unit, and promotions of unit personnel to supervisory positions outside of the unit. Under the NLRA, there is no mandatory duty for an employer to bargain regarding its non discriminatory choice of supervisory personnel. Kono-TV-Mission Telecasting Corp., 163 NLRB 1005, 65 LRRM 1082 (1967).[17]

Absent such considerations, however, we find that the generic topic of promotions is so strongly tied to an employee's terms and conditions of employment as to be a mandatory subject of bargaining under the Law.

The Town at p. 18 of its Brief, contends that even if we find promotions to be mandatory subjects of bargaining in general, that the Civil Service Law, G.L. c.31 and the Danvers Town Manager Act restrict the bargainability of this topic in the instant case.[18] Clearly, any conflict between a collective bargaining agreement provision and G.L. c.31 would be resolved in favor of Chapter 31 since the latter is not enumerated in Section 7 of the Law. But any conflict with the municipal personnel ordinances would be resolved in favor of the collective bargaining agreement.

The problem of conflict between the mandatory topic of promotions under a collective bargaining statute and Civil Service Law was faced in New York in City of Albany, 7 PERB 3132 (1974). For non-competitive (i.e. non-civil service tested) classifications, PERB made the distinction discussed between promotions within and outside of the bargaining unit. As to promotions within the unit, PERB found that they are mandatory subjects of bargaining. Promotions outside of the negotiating unit, however, were deemed non-mandatory subjects of bargaining.

As to competitive classifications, PERB examined the specific union proposals in question, and concluded that where civil service rules were not obligatory, and were within the discretion of the employer, (e.g. the employer could accept or reject one out of the three top names on a civil service list) then procedures as to these discretionary promotions were a mandatory subject of bargaining.

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[17] Under the NLRA, supervisors are not protected employees for purposes of collective bargaining. Thus any promotion to a supervisory position would be a promotion out of the bargaining unit. Such would not be the situation under G.L. c.150E where non-managerial, supervisory positions may be within the bargaining unit. We do not reach this issue here.

[18] G.L. c.31, §20 provides that appointments and promotions in police and fire forces of cities and towns within official service shall be made only by competitive examination. The Danvers Town Manager Act provides in Sec. 13(c) (cont'd.)

We are confident that, should the question arise, it will be possible to reconcile G.L. c.31 with any specific problem regarding promotions. Here we simply rule that the general topic of promotion procedures is mandatorily bargainable.

Duties

It is tautological that job duties affect conditions of employment and are, therefore, mandatory subjects of bargaining. Bemus Point Central School District, 6 PERB 4540 (1973) held that a unilateral change in an employee's duties was an improper refusal to bargain, and without further explanation stated that "the long established duties of unit employees are so intertwined with 'terms and conditions of employment' as to be a mandatory subject of negotiation." 6 PERB at 4657. We agree.

This is not to say, however, that we are unaware that there exist several levels at which "job duties" may be discussed, not all of which may be mandatory subjects. For example, whether a person hired as a typist be required to type is clearly not a mandatory subject of bargaining. It would be equally ridiculous to require bargaining over whether a firefighter is required to fight fires. At this level the generic job description is not a mandatory subject of bargaining. However, a myriad of other issues may indeed by involved in the general topic of "job duties." Is a typist required to supply coffee to managerial employees? Is a firefighter required to paint the firehouse? We cannot find that an employer's managerial prerogatives go so far as to permit it to unilaterally determine and change at will all job duties for a given position. Thus, we find that the general topic of job duties is a mandatory subject of bargaining.

Assignment of Unit Work to Non-unit Personnel

At the federal level, it has long been held that the generic subject of the assignment of unit work to non-unit personnel is a mandatory subject of bargaining. Fibreboard Paper Products Corp., supra, American Needle and Novelty Co., 206 NLRB 534, 87 LRRM 1526 (1973), Stone and Thomas, 221 NLRB No. 101, 90 LRRM 1569 (1975); Crown Coach Corp., 155 NLRB 625, 60 LRRM 1355 (1965). These and other cases, however, have often made distinctions between the duty to bargain over the impact of such assignments and the duty to bargain over the initial decision to assign. In this case, since the Town refused to negotiate over the general topic without revealing its specific objections to the Union's initial proposal, we need not reach the issue of impact versus decision. We do, however, find that the generic topic of the assignment of unit work to non-unit personnel is mandatorily bargainable between the parties.

Time Slips[19]

On the basis of the record in this case, we find that the Town unilaterally

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18 (cont'd.)
that "except as otherwise provided by the Act, the Town Manager shall appoint upon merit and fitness alone, and subject to the provisions of c. 31 of the General Laws, where applicable, may remove, all officers and employees of the town.."

[19]This is the charge in Case No. MUP-2292.

instituted a change in the requirements for filling out firefighter time slips. However, we find the change to be de minimis. The past practice with respect to time slips required firefighters only to enter the time they began and finished their shifts and the number of hours spent on the shift. The change required the entry of hours spent on specific duties. No evidence was presented which elevated this change to the level of an additional job duty. Accordingly, we find the change to be too insignificant to require that it be negotiated.

Conclusion

Based upon the foregoing, we hereby find that the Town violated Sections 10(a)(1) and (5) of the Law in its refusal to bargain with the Union on promotions, job duties, and assignment of work to non-unit personnel. We adopt the mandatory/permissive doctrine for the purposes of determining the scope of topics covered by the public employee collective bargaining law. In adopting this doctrine the Commission balances the interest of employees in bargaining over a particular subject with the interest of the public employer in maintaining its managerial prerogatives. We recognize that it is nearly impossible to draw definitive guidelines for determining whether a particular subject shall be mandatorily bargainable. We will consider such factors as the degree to which the topic has direct impact on terms and conditions of employment; whether the issue involves a core governmental decision or whether it is far removed from terms and conditions of employment. We find permissive topics to involve that type of governmental decision which should be reserved for the sole discretion of the elected representatives. The parameters of the bargainable subjects await future decisions.

ORDER

WHEREFORE, based upon the foregoing, it is hereby ORDERED that the Town of Danvers shall:

1. Cease and desist from:

   a. Failing to and refusing to bargain in good faith over promotions, job duties and assignment of unit duties to non-unit personnel with Local 2038, International Association of Fire Fighters, AFL-CIO, CLC.

   b. In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed by the Law.

2. Take the following affirmative action which will effectuate the policies of the Law:

   a. Bargain in good faith with the representatives of Local 2038, International Association of Fire Fighters, AFL-CIO, CLC over promotions, job duties and assignment of unit duties to non-unit personnel as well as all other mandatory subjects of bargaining.

b. Post in conspicuous places where employees represented by Local 2038, International Association of Fire Fighters, AFL-CIO, CLC usually congregate, or where notices are usually posted, and for a period of thirty (30) days thereafter, copies of the attached Notice to Employees.

c. Notify the Commission, in writing, within ten (10) days of the service of this Decision and Order of the steps taken to comply therewith.

WHEREFORE, based upon the foregoing, it is hereby ORDERED that the Complaint in Case No. MUP-2292 and all matters set forth in the Complaint in Case No. MUP-2299, except as otherwise set forth above, are DISMISSED. SO ORDERED.

James S. Cooper, Chairman

Garry J. Wooters, Commissioner

NOTICE TO EMPLOYEES OF THE TOWN OF DANVERS
POSTED BY ORDER OF THE MASSACHUSETTS LABOR RELATIONS COMMISSION

The Massachusetts Labor Relations Commission, in a Decision dated April 6, 1977 found that the Town of Danvers committed prohibited practices in violation of Section 10(a)(5) and (1) of the General Laws, Chapter 150E.

Chapter 150E of the General Laws gives public employees the following rights:

To engage in self-organization.

To form, join or assist any union.

To bargain collectively through representatives of their own choosing.

To act together for the purpose of collective bargaining or other mutual aid or protection.

To refrain from all of the above.

WE WILL NOT do anything that interferes, restrains or coerces employees in their exercise of these rights. More specifically,

WE WILL upon demand, bargain collectively in good faith over generic topics of promotion, job duties, and assignment of unit duties to non-unit personnel with representatives of Local 2038, International Association of Fire Fighters, AFL-CIO, CLC.

TOWN OF DANVERS

CHAIRPERSON OF THE BOARD OF SELECTMEN

CITY OF LEOMINSTER AND NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, MUP-2562 (4/11/77)

(50 Duty To Bargain)
54.26 time clocks
54.55 past practices
(60 Prohibited Practices By Employer)
67.8 unilateral change by employer

Hearing Officer: David F. Grunebaum, Esq.

Appearances:

Joellen M. D'Esti, Esq. - Counsel for National Association of Government Employees
Gregory Anglini, Esq. - Counsel for the City of Leominster

HEARING OFFICER'S DECISION

Statement of the Case

On August 5, 1976, Local RI-252 of the National Association of Government Employees (the Union) filed a Complaint of Prohibited Practice with the Massachusetts Labor Relations Commission (the Commission) against the City of Leominster (the Employer). The Complaint alleged that the Employer had installed a time clock without bargaining with the Union in violation of Chapter 150E of the General Laws (the Law).

The Commission, pursuant to the power vested in it by Section 11 of the Law, investigated the aforesaid Complaint, and on November 25, 1976 issued its own complaint of prohibited practice, alleging that the Employer had unilaterally changed a term and condition of employment in violation of 10(a)(1) and (5) of the law. The Employer denied the allegation and filed a Motion To Dismiss urging deferral to arbitration. Pursuant to notice, an expedited hearing was held before Hearing Officer David F. Grunebaum on January 4, 1977. Full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues was afforded all parties. The Motion To Dismiss was not raised at the hearing or argued in briefs. The Employer having waived its opportunity to press its Motion, the Motion is hereby denied.

Findings of Fact

1. The City of Leominster is a municipal employer within the meaning of Section 1 of the Law.

2. Local RI-252, National Association of Government Employees is an employee organization within the meaning of Section 1 of the Law and is the exclusive representative for the purposes of collective bargaining of certain employees of the Leominster Department of Public Works.

3. The Leominster Department of Public Words (the DPW) is a Department of the government of the City of Leominster and the Street and Sewer Department is a division within that Department.

City of Leominster and National Association of Government Employees, 3 MLC 1579

Prior to August 9, 1976, the DPW employed a timekeeper. The timekeeper maintained time records on each employee by manually noting his[1] hours on record forms maintained for this purpose. Maintaining these records was a definable portion of his responsibilities. Employees were required to work a specific number of hours per week, with regularly scheduled shift times. However, the timekeeping practices at the Leominster DPW were somewhat informal. Employees reporting for work would report to the working foreman who set up the crew. At about five minutes past seven, the foreman reported the crew attendance to the Department timekeeper. Any employees arriving after that time would report directly to the timekeeper. The practice had the effect of allowing Department employees five minutes leeway before they were subject to penalty for lateness.

On paydays, employees of the Street and Sewer Department would return to the yard at 11:30 A.M. After putting away the trucks, they would be released at 11:45, fifteen minutes before their scheduled lunch period, to allow them time to cash their pay checks. That practice was instituted over ten years ago by order of the previous mayor who had received complaints that city employees were cashing payroll checks at various times during the workday. That practice continued until August 9, 1976.

I find there also exists a past practice within the DPW to pay employees called up for emergency overtime, from the time of the call-up, rather than from the time of arrival at the garage. This practice has not been altered.

In July, 1976, while collective bargaining was taking place, unit employees reported to Union President Michael Imbriani rumors that a time clock was to be installed. When Mr. Imbriani observed a crate which had been delivered to the Department from the Simplex Corporation, he concluded that the crate contained a time clock. On or about July 16, 1976, Mr. Imbriani wrote to the Director of Public Works, Mr. Benoit, protesting installation of the time clock without bargaining. He received no response. Union representatives raised the issue of the installation of time clocks at a subsequent bargaining session and were told by the City's negotiator that although the City Purchasing Agent had signed the order, no one knew who had ordered the time clock.

Sometime between July 14-21, 1976, Santino P. Fantozzi, the Cemetery Superintendent, was appointed Acting Director of Public Works to replace the retiring Mr. Benoit. Mr. Fantozzi had previously assumed the role of Acting Director of the Department of Public Works from 1971 to 1973. He was aware of the Department's past practice regarding check-cashing time on paydays. Mr. Benoit did not show him the letter of protest from Mr. Imbriani. Mr. Fantozzi saw that letter for the first time after the Union filed its complaint with this Commission.

Acting upon instructions from the mayor, and without consultation with the Union representative, Mr. Fantozzi issued an order during the week of August 2, 1976, directing all hourly employees to begin to use the time clock as of August 9, 1976.

Following the installation of the time clock, the Employer continued its practice of allowing employees five minutes leeway when reporting for work. That practice, however, was extended to include lunch hours, including paydays.

1 - See page 1581.

City of Leominster and National Association of Government Employees, 3 MLC 1579

Employees now cannot punch out at lunch before 11:55 without risk of penalty. The effect of the installation of the time clock was to deprive those employees, who had been entitled to the extra check-cashing time, of ten of the previously allowed fifteen minutes.

Opinion

The Union contends that the effect upon hours and wages on employees of the DPW of Employer's decision to install a time clock without consultation with the Union was unilateral change in violation of Sections 10(a)(1) and (5) of the law. The Commission has consistently held that inherent in the duty to bargain collectively imposed by Section 6 of the law is the obligation of the Employer not to alter established terms and conditions of employment without first consulting or bargaining with the representatives of its employees. City of Boston, MUP-2646-7, 3 MLC ___ (1977); Town of North Andover, 1 MLC 1103 (1974); see, NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962). The duty to refrain from unilateral action applies not only to contract provisions, but also to long-standing customs and practices. City of Everett, 2 MLC 1471, 1474 (1976).

A finding of unilateral change in a condition of employment requires at least three elements: 1) unilateral action, 2) an action that affects either wages, hours or other terms and conditions of employment, and 3) a change from a well-established past practice. Town of North Andover, 1 MLC at 1106. The elements of this test have been estalbished by the record in this case.

1. The City's action was unilateral. The time clock was installed by Acting Director Santino Fantozzi at the direction of the Town Manager. Neither consulted with the Union about the decision or its impact, despite the Union's letter of protest and inquiries at the negotiating session. I find that the Union's acts were sufficient notice to the Employer that the Union wanted to bargain on the issue and therefore constituted a demand for bargaining under the Law, even though one employer representative, Mr. Fantozzi, was not informed of the Union's protests.

2. The unilateral action by the Employer affected a mandatory subject of bargaining. The installation of the time clock was accompanied by new rules regarding the procedure by which employees reported their attendance. These rules had an effect on both wages and hours, in that employees were required to be on duty for an additional ten minutes on paydays without any increase in pay.

Work rules affect terms and conditions of employment and are generally mandatory subjects of collective bargaining. Murphy Diesel Co., 184 NLRB 757, 762 (1970). However, the duty to bargain arises not when the employer merely posts or enforces existing rules, but rather when it propounds rules which represent a "material, substantial and significant change" in its rules and practices. Id. 7623. Absent discrimination, an employer does not violate the law when it institutes a time clock as a more efficient and dependable method for enforcing its existing rules. Rust Craft Broadcasting of New York, Inc., 225 NLRB No. 65, 92 LRRM 1576 (1976).

[1] Masculine pronouns are used for succinctness only and are intended to refer to both males and females.

The Employer testified that the time clock was installed to provide more accurate records. There was no suggestion that there was any discriminatory motive. I find that the time clock was installed to better enforce existing rules and that the new procedure for reporting attendance was not such a substantial and significant change in practice as to create a duty to bargain. However, the Employer is subject to a duty to bargain to the extent that the new procedure affects a change in work rules.

3. The introduction of the time clock was accompanied by a new, changed, more stringent practice regarding lunch hours on paydays. No other change from a prior practice was proved.[1]

The City's witnesses confirmed the Union's testimony of the City's past practice of allowing certain employees of the Department of Public Works an additional fifteen minutes on their lunch hour on payday. The practice was established by a previous mayor over ten years ago and was known to Acting Director Santino Fantozzi, through his previous experience as Acting Director of the DPW. The testimony is also unrebutted that following the installation of the time clock, this practice was discontinued. The affected employees now cannot punch out at lunch on paydays until 11:55 without risk of penalty, a change which has had the result of depriving these employees of ten of the previously allowed fifteen minutes.

The City's failure to negotiate with the exclusive representative prior to instituting a change in terms and conditions of employment constitutes a refusal to bargain in violation of Section 10(a)(5) of the law. Because such unilateral action undermines the representative status of the employee organization, I also find that the Employer engaged in activity that interfered with, restrained and coerced employees in the exercise of their right to bargain through their chosen representative in violation of Section 10(a)(1) of the Law.

Order

WHEREFORE, on the basis for the foregoing, it is hereby ORDERED that the City of Leominster shall:

[1]The Union alleged a second past practice which could be affected by the institution of the time clock. The Union president testified that when he was called for emergency overtime, he was credited with time rounded to the prior hald hour, rather than from the time actually called. However, he did not know if this practice was used when the call-up was a twenty-five minutes past the hour. Further, Mr. Pulsinetti, who had worked for the Department for twenty-eight years, three as foreman, remembered no such extra credits. I find to the extent that the foreman doing the call-up for the emergency overtime granted extra time, he used his discretion in reporting the time to be credited. However, there was not sufficient evidence of consistent application of the rule to establish a past practice, nor is there evidence that the granting of such extra time was either recognized or authorized by the City. There was also testimony regarding an initial method for City dump workers to punch in at the Central Garage and a subsequent change to punching in at the Water Works. Here, the alleged past practice amounted to, at best, one month and never predated but was expressly related to the installation of the time clock. I find absolutely no merit in this allegation.

City of Leominster and National Association of Government Employees, 3 MLC 157.

1. Cease and desist from:

   a. Interfering with, restraining or coercing employees in the exercise of rights guaranteed under the Law;

   b. Failing to and refusing to bargain in good faith with Local RI-252 of the National Association of Government Employees;

2. Take the following affirmative action:

   a. Restore the practice of releasing certain employees of the Leominster Department of Public Works at 11:45 A.M. on paydays consistent with the practice prior to the installation of the time clock.

   b. Pay to each of the employees of Leominster Department of Public Works represented by the Association, who regularly report to the Central Garage, an amount equal to one sixth of one-hour's wages for each week since August 9, 1976, plus 6% interest to the date of payment;

   c. Post in conspicuous place, where notices to employes are usually posted and leave posted for a period of thirty (30) days, the Notice to Employees accompanying this Decision and Order;

   d. Notify the Commission within ten (10) days of the service of this Decision and Order upon it of the steps it has taken to comply with it.

David F. Grunebaum, Esq.
Hearing Officer

NOTICE TO EMPLOYEES OF THE CITY OF LEOMINSTER
DEPARTMENT OF PUBLIC WORKS
POSTED BY ORDER OF THE STATE LABOR RELATIONS COMMISSION

The City of Leominster -

1. WILL NOT restrain, coerce, or interfere with employees in the exercise of their right to bargain collectively;
2. WILL NOT unilaterally alter the terms and conditions of employment of employees of the Department of Public Works without negotiating such changes with the exclusive representative of those employees, and,
3. WILL restore the practice of releasing certain employees of the Leominster Department of Public Works at 11:45 A.M. on paydays.
4. WILL pay to each of the employees affected by the discontinued practice an amount equal to one sixth of one-hour's wages for each week since August 9, 1976, plus 6% interest to date of payment.

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.